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No. 82-1195

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

DALE F. MEYER,
on behalf of himself and
all others similarly situated,
Petitioner,

vs.

THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC.,
UCA SYSTEMS, INC., JAMES L. MILLER,
and GERALD P. KOOYERS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Briefs in Opposition submitted on behalf of Respondents in this case raise issues that may prove relevant to an ultimate disposition of the plaintiff's cause of action but are not the basis of the sole ground on which the Ninth Circuit affirmed the dismissal by the district court and the sole question presented by the petition for a writ of certiorari.

Respondents contend that under the Commodity Exchange Act the regulatory authority of the Commodities Futures Trading Commission, as successor to the Secretary of Agriculture, over such matters as the operation

of commodity exchanges, fraudulent practices by members and efforts at price manipulation, either (1) expressly precludes any application of the federal securities laws or (2) constitutes adequate grounds for interpreting the "security" definition in the latter laws as not encompassing discretionary commodity trading accounts.

The court of appeals in its decision below did not find it necessary to reach or address either contention, as its opinion makes evident. After holding, in accordance with *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, ... U.S. ....., 102 S.Ct. 1825 (1982), that the Commodity Exchange Act did not preclude the district court of subject matter jurisdiction, the court of appeals gave that act no further attention. Instead, the court held that the type of investment arrangements involved in this case could not constitute a security because one of the requisite elements was lacking: a "common enterprise", under the Ninth Circuit's version of vertical commonality. The correctness of that holding, and hence of the Ninth Circuit's approach to the problem of security definition under the Securities Act of 1933, is the only question raised by the petition for a writ of certiorari.

Both Respondents in effect concede that the Ninth Circuit's position in this case is in conflict with that of the Fifth Circuit, as Petitioner pointed out. See *SEC v. Koscot Interplanetary*, 497 F.2d 473 (5th Cir. 1974); *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974). Nor does either Respondent even attempt to reconcile the Ninth Circuit's concept of vertical commonality with the facts underlying this Court's basic decision in *SEC v.*

W. J. Howey Co., 328 U.S. 293 (1946). Under the Ninth Circuit test there could be no security in *Howey*, which is hardly what this Court held.

What Respondents do wish to argue, of course, is that the decision below is correct. That will be a matter for the briefs on the merits, if the writ is granted. At this stage, Petitioner seeks only to establish that the question of the proper definition and coverage of the federal securities laws is an extremely important one that it would be timely to address, and that the present state of the law in this area is in conflict and disarray. Those propositions seem to Petitioner to be hard to deny, and neither Respondent undertook to rebut them.

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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